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No. 81-71

In the Supreme Court of the United States

OCTOBER TERM, 1981

ROBERT D. UNION, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioner's arrest was based upon probable cause.

2. Whether petitioner's post-arrest statements admitted in evidence by the district court were obtained in violation of *Miranda* v. *Arizona*, 384 U.S. 436 (1966).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 22-24) is not yet reported. The opinion of the district court (Pet. App. 1-21) is also unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 11, 1981. The petition for a writ of certiorari was filed on July 10, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following the denial in part of his motion to exclude statements on April 17, 1980, and a bench trial upon an agreed statement of facts in the United States District Court for the District of Maryland on April 21, 1980, petitioner

was convicted of possession of heroin with intent to distribute it in violation of 21 U.S.C. 841(a)(1). Petitioner was sentenced to four years' imprisonment and a special parole term of five years.

1. The relevant facts are found in the transcript of the March 21, 1980, evidentiary hearing on petitioner's motion to exclude, and are summarized in the district court's opinion (Pet. App. 2-8, 12, 14-17). On March 14, 1979, agents of the Drug Enforcement Administration ("DEA") and local police officers entered and searched the apartment of Max Blumberg in Baltimore, Maryland. The search was conducted pursuant to a warrant authorizing the agents to search for narcotics, narcotics paraphernalia, and United States currency (Tr. 24).[1] The agents uncovered a quantity of heroin, $4,000 in cash, and narcotics paraphernalia (Tr. 10). Blumberg was present during the search and was arrested. While the agents were in Blumberg's apartment the telephone rang four times. On the first two occasions a DEA agent answered and advised the caller that Blumberg was in the shower. Subsequently, Blumberg agreed to cooperate and informed the agents that the caller was probably the petitioner, who had supplied heroin to Blumberg several days earlier. Blumberg told the agents that he was expecting petitioner to stop by to pick up money owed him for the heroin and possibly to deliver additional heroin as well (Tr. 11).

DEA agents had previously secured information from two informants linking petitioner to the distribution of heroin in association with Blumberg. One informant had stated that petitioner, Blumberg and others were importing

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[1]The transcripts of the exclusion hearing and petitioner's trial are numbered sequentially. Both are cited as "Tr." The exclusion hearing transcript occupies transcript pages 1-126.

heroin from Southeast Asia and from Europe for distribution in the Baltimore area (Tr. 5-6). This particular informant had provided significant and reliable information on drug law violations on earlier occasions, including, in one instance, information which led to the arrest of four individuals, and the seizure of two vehicles and 500 pounds of marijuana, and other information which led to a drug arrest on a different occasion (*id.* at 5). Seven days prior to petitioner's arrest, a second informant had advised DEA agents that Blumberg and petitioner were partners, at times, in heroin distribution, that the informant had seen heroin in Blumberg's apartment, and that Blumberg was selling heroin for $400 to $550 per gram (*id.* at 7-8).

At the request of the DEA agents, Blumberg answered the telephone when petitioner called for the third time. He told petitioner that everything was "okay" and that he should come over. Blumberg provided the agents a description of petitioner and petitioner's car. Petitioner called a fourth time from the lobby of Blumberg's apartment building. Blumberg again told petitioner that it was safe to come to the apartment (Tr. 11-12, 27).

Petitioner was arrested in the building lobby immediately thereafter (Tr. 49-50). The arresting officer advised petitioner of his rights, but neglected to mention specifically that petitioner had the right to have an attorney present during interrogation (Tr. 53).[2] At the time of his arrest (11:10 p.m.) petitioner was nervous and disoriented (Tr. 47, 54). He was taken to a room off the lobby and was strip

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[2]The warning given referred to the petitioner's right to remain silent, and stated that anything he said could be used against him in a court of law, and that if he could not afford an attorney one would be appointed for him (Tr. 53).

searched.[3] Petitioner was transported to police headquarters at approximately 11:45 p.m. (Tr. 54-57). At police headquarters petitioner was questioned by DEA agent Keller concerning a number of individuals believed to be trafficking in drugs in the Baltimore area.[4] By this time petitioner's appearance was normal (Tr. 17-18). Petitioner described the narcotics activities of these individuals but did not implicate himself (Tr. 101-102).[5] At 12:25 a.m. petitioner executed an advice of rights form that fully defined all of his *Miranda* rights; he acknowledged his understanding and voluntary waiver of those rights (Tr. 69-73). Thereafter, petitioner made statements to DEA agents incriminating himself (Tr. 143-144).

2. Petitioner sought exclusion of all of the statements he made to law enforcement officers, arguing that his arrest was not supported by probable cause, that an unlawful arrest tainted his statements to police, and that his statements were inadmissible because he was inadequately advised of his rights as required by *Miranda* v. *Arizona*, 384 U.S. 436 (1966) (Pet. App. 1). The district court determined that the arrest was proper under the standards announced in *Aguilar* v. *Texas*, 378 U.S. 108 (1964), and

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[3]The search of petitioner revealed a folded piece of paper containing a white powder (Tr. 36). A consent search of petitioner's car also conducted while the petitioner was at Blumberg's building revealed a bag of marijuana, a gun, and $42,000 in cash (Tr. 109, 120, 138-139). At trial, the government did not introduce any evidence seized from petitioner, his car or his motel room (see note 5, *infra*; Tr. 3).

[4]Agent Keller had been advised that petitioner had already been given his *Miranda* warnings (Tr. 22). Agent Keller testified that prior to questioning petitioner he specifically asked him if he wanted to call a lawyer and petitioner said no (Tr. 32). Petitioner testified that he requested access to a phone, although he did not indicate his purpose was to contact an attorney, and that his request was refused (Tr. 91).

[5]Petitioner signed a consent form authorizing Agent Keller to search his motel room (Tr. 15-17).

Spinelli v. *United States*, 393 U.S. 410 (1969), noting that the second informant's information was both demonstrably reliable and based upon firsthand knowledge. Although the basis of the first informant's information was not clear, it provided corroboration. Finally, the court observed that the arrest was supported by Blumberg's statements implicating petitioner, which were obviously based on firsthand knowledge and which bore circumstantial indicia of reliability (Pet. App. 8-12).

Although petitioner's statements were accordingly untainted by the circumstances of his arrest, the district court concluded that the incomplete *Miranda* warning given to petitioner upon his arrest required exclusion of his statements given prior to the time he received the complete written explanation of his rights (Pet. App. 12-15). Finally, upon weighing the surrounding circumstances as dictated by *Schneckloth* v. *Bustamonte*, 412 U.S. 218 (1973), the court concluded (Pet. App. 15-20) that petitioner's "waiver of those rights once he was properly advised of them was voluntary and his decision to cooperate uncoerced" (*id.* at 20). The court accordingly declined to exclude statements rendered thereafter.

3. The case was tried on an agreed statement of facts, which was read into the record (Tr. 136-144). It was agreed that Max Blumberg would testify that in the three years prior to petitioner's arrest he had engaged in over 100 narcotics transactions with petitioner and that on March 11, 1979 petitioner, who had just returned from Acapulco, Mexico, visited him and delivered a plastic bag containing ground rock heroin. In addition, Blumberg would testify that on March 6, 1979, at petitioner's direction, he picked up approximately two grams of heroin. Blumberg would also testify that in his transactions with petitioner he was always the buyer and petitioner was always the seller (Tr. 136-140). Petitioner's presence at Blumberg's apartment on

March 11, 1979, would be corroborated by a parking ticket issued while petitioner's car was parked outside Blumberg's apartment building (Tr. 140-141). The quantity and quality of the heroin seized from Blumberg's apartment would be established by the testimony of a forensic chemist (Tr. 141-142). Finally, DEA Agent LaCarrubba would testify to petitioner's admissions that he had supplied Blumberg with a quantity of heroin on March 11, 1979, for which Blumberg owed him $6,365 and that he had supplied Blumberg with one and a half grams of heroin approximately two months earlier (Tr. 143-144).

4. The district court found petitioner guilty (Tr. 151). The court of appeals affirmed the conviction and the admission, through the agreed statement of facts, of petitioner's statement to Agent LaCarrubba, made after petitioner had received complete *Miranda* warnings (Pet. App. 23-24). The court rejected petitioner's argument that statements made prior to that time rendered the latter confession involuntary, observing (*id.* at 23 n.*):

> by appellant's own account the earlier statements concerned the activities of others and did not implicate or incriminate appellant; the record reveals that neither the excluded statements nor any incident of the arrest and detention vitiated the voluntariness of appellant's confession.

ARGUMENT

Petitioner's claims are without merit. They were carefully considered and correctly rejected by the courts below based upon application of the controlling decisions of this Court. There is no need for further review.

1. Petitioner's contention (Pet. 3-10) that his arrest was not based upon probable cause is unfounded.[6] In *Aguilar* v. *Texas*, 378 U.S. 108 (1964), and *Spinelli* v. *United States*, 393 U.S. 410 (1969), this Court held that indicia of an informant's veracity and the source of his or her knowledge of the matter stated must be shown in order to establish the sufficiency of statements tendered to support a finding of probable cause to arrest or search. An informant's veracity may be established by his previous reliability, see, *e.g.*, *United States* v. *Watts*, 540 F. 2d 1093, 1097 (D.C. Cir. 1976), or by the detailed character of the information supplied, *Draper* v. *United States*, 358 U.S. 307, 313 (1959), or by the fact that the information also implicates the informant, *United States* v. *Harris*, 403 U.S. 573, 583 (opinion of Burger, C.J.), 585 (statement of White, J.) (1971). Hearsay information from several sources, each insufficient, standing alone, to supply probable cause, may collectively sustain a finding of probable cause. *Spinelli*, *supra*, 393 U.S. at 418.

These principles were properly applied by the district court. Indeed little need be added to the district court's discussion (Pet. App. 7-12). As the court indicated (*id.* at 9), the second informant's information was based upon direct personal observation, and his reliability had been shown by the discovery of contraband in Blumberg's apartment. And Blumberg's information was, perforce, based on personal knowledge, and was sufficiently corroborated by other information—including petitioner's repeated telephone calls—to dispel any inference that his statement was a self-

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[6]DEA Agents are authorized to make an arrest if they have probable cause to believe that a felony has been committed or is being committed. 21 U.S.C. 878(3).

serving fabrication.[7] The first informant's statement served to corroborate further the other information known to law enforcement agents who arrested petitioner. Petitioner's argument rests largely on the premise that every element of the information available to officers viewed in isolation must satisfy the requirements for establishing probable cause. This premise is plainly erroneous, *Spinelli, supra*, 393 U.S. at 418, as the district court recognized (Pet. App. 9, 11). The controlling consideration is that, in light of all the information available, the DEA agents possessed a reasonably trustworthy basis for the belief that petitioner had distributed heroin. *Brinegar* v. *United States*, 338 U.S. 160, 175-176 (1949). There is no reason to disturb the trial court's finding that probable cause existed for petitioner's arrest.[8]

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[7]See *United States* v. *Jackson*, 560 F. 2d 112, 121 (2d Cir.), cert. denied, 434 U.S. 941 (1977) ("[T]here is no need to show past reliability when the informant * * * is in fact a participant in the very crime at issue.")

[8]Petitioner contends (Pet. 10-13) that his statements introduced at trial should have been excluded as the fruits of an unlawful arrest. Neither court below had occasion to reach this contention, although the district court's conclusion (see Pet. App. 15-20) that petitioner made his statement voluntarily with complete awareness of his Fifth Amendment rights is relevant. Assuming arguendo that there was a technical defect in the foundation for the arrest, the circumstances of this case suggest that petitioner's statements were the product of his free will, rather than a fruit of the arrest. In *Brown* v. *Illinois*, 422 U.S. 590, 603-604 (1975), the Court noted five factors bearing on this determination: the giving of *Miranda* warnings, the time elapsed between the arrest and the statement, the presence of intervening circumstances, the voluntariness of the statement and "particularly, the purpose and flagrancy of official misconduct [footnote omitted]." Here, complete *Miranda* warnings were given prior to the statement at issue; the arrest of Blumberg, and his cooperation with police, supplied an intervening and independent motive for petitioner's cooperation; and the district court found that petitioner's statement was given voluntarily (see pages 9-10, *infra*). Finally, even if there were some deficiency in the foundation for the arrest, it is apparent that the officers acted reasonably, in a good faith belief that the arrest was proper, and without any preformed plan to

2. Petitioner contends as well (Pet. 13-18) that his statement introduced at trial was taken in derogation of his Fifth Amendment rights, suggesting that, notwithstanding the adequacy of the *Miranda* warnings ultimately given, the statement was tainted by the interrogation that had taken place prior to the perfection of the warnings. The court of appeals correctly rejected this contention (Pet. App. 23 n. *).[9] Prior to administration of the second set of *Miranda* warnings, petitioner had not implicated himself in the distribution of heroin (Tr. 101-102). Accordingly, he had not let any "cat out of the bag" so as to vitiate the voluntariness of his subsequent statements. Compare *United States* v. *Shelly*, 430 F. 2d 215 (2d Cir. 1970); *United States* v. *Pierce*, 397 F. 2d 128 (4th Cir. 1968); cf. *Tanner* v. *Vincent*, 541 F. 2d 932, 936-937 (2d Cir. (1976)), cert. denied, 429 U.S. 1065 (1977).

Petitioner's reliance (Pet. 15-16) on *Brown* v. *Illinois*, 422 U.S. 590, 605 (1975), is accordingly misplaced, for it is not true here, as it was there, that "the second statement was clearly the result and the fruit of the first." The decision in *Brown* v. *Illinois* rests upon the conclusion that *Miranda* warnings are not necessarily sufficient to vindicate the values protected by the Fourth Amendment as well as those safeguarded by the Fifth Amendment. 422 U.S. at 601. In

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arrest petitioner illegally—for the arrest of petitioner was an unforeseen consequence of the search of Blumberg's apartment. Accordingly, exclusion of the statement would not be required in any event.

[9]Petitioner apparently does not quarrel with the district court's determination of the voluntariness of the statement (see Pet. App. 15-20) generally, but only with its asserted failure to focus upon the effect of the prior statement. While we believe that the district court's ultimate conclusion on voluntariness encompasses this point, the court of appeals noted that "the District Judge did not address this argument specifically in his Memorandum" (*id.* at 23 n.*). The court of appeals' opinion quoted above (page 6, *supra*) remedied any deficiency in the district court's explanation of its holding.

Brown the passage of time and renewed *Miranda* warnings were deemed insufficient to overcome the pressure to cooperate attributable to the primary taint of an illegal arrest, particularly when that pressure was bolstered by the giving of an initial incriminating statement. 422 U.S. at 604-605 n.12. Here, however, there was no such taint (see pages 7-8, *supra*). And the administration of complete *Miranda* warnings is effective to insulate the petitioner from any pressure to cooperate based upon his earlier, non-incriminating statement, where the only "illegality" was merely the administration of an incomplete *Miranda* warning, for before making the statement admitted into evidence the petitioner was reminded, in clear terms, that he retained the right to remain silent and to consult with counsel before providing any further information.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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